IN THE

Supreme Court of the United States

October Term, 1978

No. 79-318

JOHN R. TORQUATO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

CITATIONS

Cases

Constitutional Provisions

Statutes

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Your petitioner, John R. Torquato, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-captioned case.

OPINIONS BELOW

The memorandum order of the district court, not reported, appears as Appendix A hereto. The opinion of the court of appeals, not yet reported, appears as Appendix B hereto; and the order of the court of appeals, not yet reported, appears as Appendix C hereto.

JURISDICTION

The judgment of the court of appeals, affirming petitioner's conviction, was entered on July 5, 1979. A timely petition for rehearing was denied on August 1, 1979, and this petition for a writ of certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the constitutional right of cross-examination requires that the defendant (the county chairman of a political party) in a 18 U.S.C. §1951, the "Hobbs Act", prosecution be permitted to inquire into the financial status of a co-defendant who testified he was free of criminal liability under the Act because all of the money he collected from state highway department equipment lessors was delivered to the defendant, and none of it was retained by him (the co-defendant)?

II. Whether the defendant is deprived of his constitutional right to have compulsory process for obtaining witnesses in his favor when the trial court refuses to admit defense testimony from state highway department equipment lessors, who regarded payments to political parties as voluntary and declined to contribute yet retained their state contracts, while the court admitted government testimony from lessors in the same area who said they felt coerced to make the payments at the risk of losing their contracts?

III. Whether evidence of extortion of kickbacks from individuals who leased equipment to the state highway department involves a sufficient effect on interstate commerce to satisfy the Hobbs Act jurisdictional requirement?

IV. Whether a sufficient basis was established to show petitioner's prosecution was selective and discriminatory due to unjust and illegal discrimination between persons in similar circumstances, thus requiring that petitioner be afforded an evidentiary hearing on the issue?

STATUTE INVOLVED

§1951. Interference With Commerce by Threats or Violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

STATEMENT OF THE CASE

History

Petitioner John R. Torquato and two co-defendants were charged with violations of 18 U.S.C. §§2 and 1951 (the "Hobbs Act"). They allegedly conspired to, and did, obstruct, delay and affect interstate commerce by extortion; they allegedly agreed to, and did, obtain sums of money by the wrongful use of fear and under color of official right, from certain individuals who leased equipment to the Pennsylvania Department of Transportation (PennDOT).

After a jury trial, Torquato was convicted on all counts. Post-trial motions, including a motion for evidentiary hearing on the grounds of selective and discriminatory prosecution, were denied (memorandum order of the district court, Appendix A). Subsequently, Torquato was sentenced to serve a five (5) year term of imprisonment and to pay a $5,000.00 fine.

The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on July 5, 1979. A petition for rehearing was denied on August 1, 1979. The within Petition For A Writ Of Certiorari follows.

Facts

A summary of the government's evidence adduced at trial is set forth in the opinion by the court of appeals (Appendix B, pages 30a-33a). Facts pertinent to the issue of selective prosecution are set forth also in that opinion (Appendix B, pages 33a-34a and 39a-43a), and in the memorandum order by the district court (Appendix A, pages 2a-7a).

Other facts from the record which are material to consideration of the questions presented are as follows:

During the administrations of Republican Governors from 1963-1971, District No. 9-3 of the Pennsylvania Department of Transportation ("PennDOT") located in Cambria County, Pennsylvania, was under the control of Republican superintendents and the local Republican Party. Such control was maintained to January 20, 1971 when the administration of a Democratic Governor began. At that time, District No. 9-3 came under the control of Democratic superintendents, including John George and Harold Stevens (co-defendants in this case), and the local Democratic Party headed by Chairman John Torquato, the petitioner herein.

The government presented testimony from individuals (Trial transcript, "TT." 5-485, 639-643, 680-742, 814-853) who had leased various equipment to District No. 9-3 of PennDOT. Each testified to paying a certain percentage (eventually 10%) of the gross amount of each of their PennDOT checks to George or Stevens. Either of these men would collect the funds in cash (however, some checks were received) a short time following the receipt by the lessors of their checks. It was the lessors' understanding that these funds were donations to the Democratic Party. Most of the lessors considered these payments to be voluntary and not coerced by the Party. Some lessors, however, stated that they regarded the payments as necessary in order to retain their contracts with PennDOT.

Four (4) of the lessors also testified that they made similar payments based on a percentage of the gross amount of their PennDOT checks to the Republican Party and its representatives when that Party was in

control of District No. 9-3 prior to January 20, 1971 (TT. 267, 358, 446, 467-468).

The government presented witnesses who testified to selling various items, including fuel and petroleum products, tires, equipment and vehicles, to the lessors (TT. 491-638, 662-679). This testimony was offered to demonstrate how the lessors' respective businesses had an affect on interstate commerce.

Torquato rested his case without the presentation of testimony from any witness. His offer of proof concerning witnesses who had leased equipment to District No. 9-3 of PennDOT but who had not made any payments yet retained their contracts was ruled to be irrelevant by the district court (TT. 1028-1062, 1074-1075).

Co-defendant George took the witness stand and claimed to have collected monies from the lessors at Torquato's direction, and then delivered these funds to Torquato (TT. 1100-1114). Counsel for Torquato was not permitted to cross-examine George in regard to his (George's) personal finances, income and acquisition of assets over the period of time in question (TT. 1156-1167).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant Problems Concerning How an Accused May Defend Against "Extortion-Kickback" Charges Under the Hobbs Act, and What Is the Government's Burden of Proof as to the Necessary Affect on Interstate Commerce.

In recent years, the "Hobbs Act" (18 U.S.C. §1951) has been used as the statutory basis for an increasing number of federal prosecutions, often involving political officials. The instant case is one of them. While presenting an important specific concern, i.e., whether or not petitioner Torquato received a fair trial, its issues are common to this type of prosecution. The consequences of how these issues are decided are significant to any litigant charged with a violation of this statute, in terms of both how an accused may defend himself against the charges and what evidence must be offered by the government to prove the jurisdiction element.

Here, it is contended that the consequence of the lower court's decision was to sanction a deprivation of petitioner's constitutional rights under the Fifth and Sixth Amendments.

A.

PETITIONER'S RIGHT OF CROSS-EXAMINATION WAS DENIED WHEN HE WAS NOT PERMITTED TO INQUIRE INTO THE FINANCIAL STATUS OF A CO-DEFENDANT WHO SAID ALL OF THE MONEY HE COLLECTED FROM EQUIPMENT LESSORS WAS DELIVERED TO PETITIONER AND NONE OF IT WAS RETAINED BY HIM (THE CO-DEFENDANT).[1]

1. While the court of appeals in its opinion finds this issue "to be without merit", there is no discussion of the reasons for said finding (Appendix B, page 44a-45a).

During the trial, co-defendant John George testified on direct examination that he collected money from lessors in PennDOT District No. 9-3 at the direction of Mr. Torquato, the Chairman of the Democratic Party in Cambria County (TT. 1100, 1104-1105, 1123). George stated that he always delivered these funds to Torquato (TT. 1113-1114, 1126-1128). Counsel for Torquato then announced his intention to ask George about his financial condition (TT. 1160). Counsel's offer of proof, in light of the evidence that George was collecting a great deal of cash over a long period of time, concerned cross-examination of George as to his personal finances and the source of revenue for his substantial expenditures during the same period. Counsel's intent was to impeach this co-defendant who gave significant testimony inculpating Torquato. Upon objection by counsel for George, the trial court refused to permit this line of inquiry (TT. 1166-1167).

It is Torquato's position that under the circumstances the topic of George's personal finances was well within the scope of cross-examination, and that it was relevant to the issue of George's credibility. The court's refusal to permit such questioning deprived him of his constitutional right to the confrontation of adverse witnesses under the Sixth Amendment (as well as the due process of law under the Fifth Amendment).

It has been held that a defendant's right to engage in cross-examination is an essential element of a fair trial, *Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748 (1968); and a defendant must be afforded the opportunity to cross-examine any party in a joint indictment who testifies in his own behalf and incriminates the defendant. *United States v. Mercks,* 304 F.2d 771-772 (4th Cir.,

1962). Where a witness admits to being an accomplice, his credibility must be attacked and the required scrutiny can only be accomplished by a searching and wide ranging cross-examination. *Gordon v. United States,* 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953).

The facts here bear a striking resemblance to those presented in *United States v. Kenny,* 462 F.2d 1205 (3rd Cir., 1972). *Kenny* was a Hobbs Act prosecution of government officials and politicians who had received "kickbacks" from contractors in return for government contracts. The situation of co-defendant George is much like that of Kropke, a co-defendant in *Kenny.* Kropke, too, had collected money from and delivered money to various participants in the kickback scheme. On direct examination, he testified that he was innocently and unwittingly involved, and that he had never taken a dollar from any of the contractors. On cross-examination, the prosecutor questioned him about his personal finances (financial worth and expenditures). The Third Circuit held that "[t]he cross examination was proper", 462 F.2d at 1225, and then went on to explain:

> "In the face of such evidence it was proper for the court to permit the Government to test the credibility of his protestations of non-participation by seeking to establish the sources of his expenditures during the years in question." 462 F.2d at 1225-1226.

Having determined that the principle of cross-examination on this issue was proper, the court in *Kenny* noted that only,

> "[t]he bounds of such cross examination was a matter for the discretion of the trial court. *United States v. Greenberg,* 419 F.2d 808 (3rd Cir. 1971). No abuse of that discretion appears in this record." 462 F.2d at 1226.

Conversely, it is argued here that limiting the cross-examination of co-defendant George was an abuse of discretion. In an almost identical situation, the court of appeals has determined that in a Hobbs Act prosecution the inquiry into the personal finances of a co-defendant, who acted as a "collector" yet denied all criminal responsibility, was proper. It is likewise proper in the case at bar. To disallow it under the particular circumstances was a clear abuse of discretion.

Concerning the Government's counter-argument on this question, it is first noted that the proposed cross-examination was certainly within the purview of the witness' (George) testimony on direct examination. He had stated that while he collected huge sums over a period of years, he delivered all of the monies to Torquato and never enjoyed any personal gain as a result of this activity. As in *Kenny,* the proposed cross-examination would have probed these averments in the only possible fashion, and it would have complied with ". . . the general rule . . . that the questions asked must relate to some area brought out on direct examination." *Goehring v. Diamond Milling Company,* 461 F.2d 77, 79 (3rd Cir., 1972).

Second, whether or not the Government introduced evidence concerning George's financial condition is irrelevant. The fact is, the door was opened to inquire into the matter when George testified and presented the defense he did. It is also without significance that Torquato, not the Government, wished to make the inquiry.

Third, it is wholly without basis to argue that admitting the proffered evidence would have misled the jury or confused the issues. The matter of George's financial condition and how it related to the allegations

against him and Torquato was by no means complex or confusing. As in *Kenny,* it was on point with, and relevant to, the specific charges in the indictment, the Government's theory of the case and the theories argued by both respective co-defendants.

Finally, Torquato maintains that, while this Court has found that prejudice need not be shown when the Sixth Amendment right of cross-examination has been abridged, see: *Alford v. United States,* 282 U.S. 687, 692-694, 51 S.Ct. 218, 219-220 (1930); *Smith v. Illinois, supra,* 390 U.S. at 132, 88 S.Ct. at 748, the restriction upon his cross-examination did result in severe prejudice to him. Here, George, a co-defendant and alleged co-conspirator, testified that Torquato was the individual who directed the pay-off scheme and reaped the financial fruits therefrom. He provided direct evidence that the monies collected from the lessors went to Torquato. By doing so, he destroyed Torquato's argument that the Government had failed to offer sufficient proof that he (Torquato) received these monies. Without a doubt, George had become the Government's best witness against Torquato. The limitations imposed upon Torquato's cross-examination of George prevented impeachment of a key witness on a critical matter. Therefore, absent the ability to impeach under the circumstances, Torquato was so greatly prejudiced as to deprive him of a fair trial.

B.

PETITIONER'S RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR WAS DENIED WHEN HE COULD NOT PRESENT TESTIMONY FROM EQUIPMENT LESSORS WHO REGARDED PAYMENTS TO POLITICAL PARTIES AS VOLUNTARY AND DECLINED TO CONTRIBUTE YET RETAINED THEIR STATE CONTRACTS, WHILE THE GOVERNMENT PRESENTED TESTIMONY FROM LESSORS IN THE SAME AREA WHO SAID THEY FELT COERCED TO MAKE THE PAYMENTS AT THE RISK OF LOSING THEIR CONTRACTS.[2]

After the close of the government's case, pursuant to a request by defense counsel, the trial court ordered the Government to make available for review by defendants all of its investigatory (Form 302) interviews with respect to any lessor in PennDOT District No. 9-3 (TT. 1028-1050). After such review, counsel for Torquato reported to the court that the interviews disclosed that there were lessors who were not approached for donations to a political party or did not make any such donation even though they leased equipment to PennDOT in District No. 9-3. However, counsel indicated he would not attempt to call these individuals as defense witnesses in light of the court's early expression that such testimony would be irrelevant. The court then confirmed that it believed the testimony was not relevant to the issues at bar (TT. 1055-1056, 1061-1062).

Prior to opening Torquato's defense, counsel again made a proffer concerning those witnesses who would testify that, while they leased equipment to PennDOT

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2. While the court of appeals in its opinion finds this issue "to be without merit", there is no discussion of the reasons for said finding (Appendix B, page 44a-45a).

in Cambria County, they were not solicited for involuntary contributions or coerced to make any payment at the risk of losing their PennDOT contracts by Torquato or any other alleged co-conspirator. The court ruled the testimony was irrelevant and would not be admitted (TT. 1074-1075). Torquato claims this ruling was erroneous and served to deny him a fair trial.

Intent is an essential element of a Hobbs Act offense, and, as such, it must be proven beyond a reasonable doubt that a defendant intended to induce fear of economic loss in the contractors. *United States v. Stirone,* 168 F.Supp. 490 (D.C.Pa. 1957), aff'd. 262 F.2d 571, rev'd. on other grounds 361 U.S. 212, 80 S.Ct. 270. The Government's proof of intent consisted of the testimony of several of the allegedly extorted PennDOT lessors who said they believed their contracts with the state would be terminated if they did not make the payments. In response to this evidence, the defense attempted to call other lessors from PennDOT District No. 9-3 who would have testified that they regarded the payments as voluntary political contributions; some had declined to contribute, yet retained their contracts. This evidence would have directly pertained to the question of intent. Since it was undisputed that the payments were made, the issue of intent is particularly significant.

The authority for the admissibility of such evidence by the prosecution to establish intent is legion. See, e.g., *Andresen v. Maryland,* 96 S.Ct. 2737, 2750 (1976). Fundamental fairness requires that the defense be afforded the same opportunity. The court's refusal denied Torquato his right to the due process of law under the Fifth Amendment and to have compulsory

process for obtaining witnesses in his favor under the Sixth Amendment.

The Government's theory depended upon showing a pattern of payments from PennDOT lessors to the defendants; this was necessary to establish the element of extortion in this Hobbs Act prosecution. If the testimony of payments by lessors is relevant for incriminatory purposes, then the testimony of nonpayments by similarly-situated lessors is likewise relevant for exculpatory purposes, i.e., to show that this pattern did not exist and the payments were considered in fact to be voluntary political contributions, the payment or nonpayment of which having no bearing on retention of PennDOT contracts.

Again, the decision in *Kenny* is applicable. There, government witnesses testified that every contractor doing business in the city had to participate in the kickback system, and defendants failed to call any contractor to testify otherwise. Therefore, the Court held, it was proper for the prosecutor to comment on the absence of any contractor who did not pay the kickbacks on city contracts. 462 F.2d at 1228. Here, petitioner Torquato sought to avoid any adverse inference from failure to call PennDOT lessors who were not coerced into making payments. He also sought to present this testimony as part of his defense. Clearly, as in *Kenny,* the issue was relevant, and the trial court's ruling to the contrary was incorrect.

C.

THE EVIDENCE OF EXTORTION OF KICKBACKS FROM INDIVIDUALS WHO LEASED EQUIPMENT TO THE STATE HIGHWAY DEPARTMENT DOES NOT INVOLVE A SUFFICIENT EFFECT ON INTERSTATE COMMERCE TO SATISFY THE HOBBS ACT JURISDICTIONAL ELEMENT.

The evidence presented by the Government does not disclose any effect on the highways or on the activities of the state highway department as a result of the collection of political contributions. There also is no showing that these collections had an effect on an interstate business. It is argued that an effect on a business which is simply an occasional consumer in interstate commerce is not sufficient.

The individuals who were lessors to the state were not engaged in interstate commerce; their businesses were essentially local activities. In order to translate such activities to federally regulatable commerce, there must be shown " . . . such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions . . . ". *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 57 S.Ct. 615 (1937). Such a relationship is not proven here. It was not shown that the lessors who made payments were engaged in businesses in interstate commerce; nor was it proven that this commerce was somehow affected by the collection practices of the defendants.

II. The Decision Below Raises Significant Problems Concerning How an Accused Can Be Afforded an Evidentiary Hearing on the Issue of Selective and Discriminatory Prosecution.

In the courts below, petitioner Torquato vigorously argued that he had established a sufficient basis to show his prosecution was selective due to unjust and illegal discrimination between similarly situated persons, thus requiring that he be granted an evidentiary hearing on the issue. Petitioner now believes it vitally necessary for this Court's intervention in order to set forth more definitive guidelines on the treatment of a bona fide selective prosecution claim.

Beyond doubt, evidence must be presented. But what is a "sufficient basis" for the triggering of a hearing? If the instant case fails to rise to this level, can there ever be a case which does? Can the claim ever be seriously pursued? Obviously, without an evidentiary hearing, there is little, if any, chance to establish such a claim.

In the trial court, petitioner maintained that the prosecution was invalid since his right to equal protection of the law had been violated. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886); *Two Guys v. McGinley,* 366 U.S. 582, 81 S.Ct. 1135 (1961). Based on supporting facts and exhibits, he requested an evidentiary hearing on the issue of selective prosecution. Said request was denied by the lower courts.

Petitioner maintains that he has met his "burden of proving a *colorable entitlement* to the defense of discriminatory prosecution so as to entitle them (him) to the desired testimonial and documentary evidence".

United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir., 1973), (emphasis supplied). Torquato alleged that he would be able to prove at an evidentiary hearing that the government discriminated against him and singled him out for prosecution. At least one other individual was similarly situated but not prosecuted. There is evidence that the individual, while an official in the Republican Party, allegedly demanded monies from PennDOT lessors in District No. 9-3. However, the court of appeals decided that " . . . he has not made a sufficient threshold showing of selective prosecution to entitle him to an evidentiary hearing" (Appendix B, page 39a).

The court of appeals believed that petitioner Torquato's proposed evidence reveals *macing* under both the Democratic and Republican administrations, but *extortion* (of kickbacks) from PennDOT lessors only by certain Democratic officials; in this prosecution, only extortion was of concern to the Government; and therefore, the Government did not discriminate against Torquato (Appendix B, page 42a-43a).

It is respectfully submitted that in so holding, the court of appeals has overlooked or misapprehended certain facts bearing on the central question of whether or not Torquato has demonstrated such a factual basis, a "colorable entitlement", that a hearing is required. The court said that the principal evidence (the Initial Draft of the "Final Report—Pennsylvania House of Representatives Select Committee on State Contract Practices") relied upon by Torquato only identifies the Democrats and Torquato as having *extorted* kickbacks from equipment lessors. However, the Initial Draft states:

> " . . . the investigation of this Committee in Cambria County has revealed an appalling *pattern of extortion of lessors and macing of PennDOT employees.* Information provided by numerous employees makes it abundantly clear that, under both Republican and Democratic administrations, each employee was required to kickback 2% of his paycheck in order to retain his job. *The information contained in this report and in Appendix 7, strongly indicates that Robert Gleason, Cambria County Republican Chairman, and John Torquato, Cambria County Democratic Chairman have directed the orchestration of these shake down schemes."* (Appendix A, page 14a).

It is argued that "these shakedown schemes" (in the plural) refers to macing *and* extortion. Thus, the report[3] identifies both the Democratic *and* Republican administrations as having extorted kickbacks from equipment lessors.

Pertinent facts[4] elicited during trial testimony are summarized as follows:

> 1) Mr. Yanko, a lessor, said on cross-examination that he made contributions to both political parties in Cambria County. He gave checks to a Mr. Gibson, a Republican who collected from the lessors while his party controlled PennDOT District No. 9-3 (TT. 266-267).

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3. The Initial Draft had been received by the local United States Attorney's office approximately 14 months before the expiration of the statute of limitations as to the Republican officials on the federal extortion statute. But see footnote No. 5, *infra.*

4. Additional facts which were proffered at the time of the filing of the original Motion are set forth in the record in the court of appeals at Appendix (to Appellant's Brief) 71a-118a.

2) Mr. Matthews, a lessor, said on direct examination that he paid a percentage of 2 to 5% during the 1960's (when the Republicans were in control). (TT. 358)

3) Mr. Kenner, a lessor, said on direct examination that he made payments to PennDOT officials beginning in 1966. For a period of years, he paid 2% of his gross wages by check to the Republican Party (TT. 446).

4) Mr. Becker, a lessor, said that during the Republican administration he made contributions by check. He paid 5% of his wages to the Party. He explained that: "Well, it was an agreement, an unwritten law. You paid a kickback, and that was it. It was considered a kickback" (TT. 467-468). Mr. Becker's now deceased brother, Winfred Becker, had been interviewed on June 7, 1972. During that interview (a copy of which was provided to defense counsel by the Government, see: record in the court of appeals at Appendix 99a-101a), Mr. Becker stated that he and his brother, as PennDOT lessors, paid a 5% kickback to both political parties in Cambria County, depending on which party was in control.

5) Mr. George, a co-defendant and a PennDOT employee, said that it was common knowledge that lessors were making political contributions during the 1960's. The amount was 5%, it was paid to the Republican Party and it was collected by Mr. Gibson (TT. 1091-1092).

Quaere: can it be reasonably argued that all of the above does not satisfy, with a great deal to spare, the requirement of a threshold showing of a sufficient basis

for a discriminatory prosecution claim, thus necessitating a hearing?

The court of appeals seems to say that the testimony at trial indicates payments to the *Republicans* were not coerced (Appendix B, page 40a-41a). However, nearly every witness who was a PennDOT lessor testified that he considered his payments, *to both political parties,* to be "voluntary". The Government's entire case against Torquato rested upon the contrary theory that the payments were not "voluntary" in fact because they were made in order to retain the lessors' state contracts; if this theory is valid as to the Democrats, it is likewise valid, on this record, as to the Republicans.

Moreover, the court of appeals (Appendix B, page 40a-41a) says there is no proof the Government had such testimony prior to the statute of limitations date[5] for the prosecution of Republicans. This issue, it is argued, is not for consideration now; by addressing it, the court seems to be concerning itself with the selective prosecution issue on its merits instead of simply deciding whether or not a "colorable entitlement" for a hearing has been shown. At such a hearing, the multitude of questions regarding "who had what information when" would be properly addressed.

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5. It should be noted that, in view of judicial interpretation of the statute of limitations provision under the RICO statute (18 U.S.C. §§1961 et seq.), it is not certain when the prosecution of Republicans would have been barred. In other words, to simply say that after January 19, 1976 no Republican could be prosecuted is not necessarily accurate, assuming RICO could apply. This may present another issue to be resolved at the requested hearing.

CONCLUSION

For the reasons discussed above, petitioner Torquato believes a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
THOMAS A. LIVINGSTON
DENNIS J. CLARK
Counsel for Petitioner

August, 1979

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN R. TORQUATO,
JOHN GEORGE, and
HAROLD GRAHAM STEVENS,
Defendants.

Criminal
No. 77-272

Memorandum Order

COHILL, J

On June 29, 1978, following a jury trial, defendants John R. Torquato, John George and Harold Graham Stevens were found guilty of conspiracy to violate, and substantive violations of, the Hobbs Act. (18 U.S.C. §1951 and §2). The indictment contained 31 counts. Count 1 charged all three defendants with conspiracy to extort, or take "kickbacks," from lessors of equipment to the Pennsylvania Department of Transportation ("PennDOT"). The remaining 30 counts each charged all three defendants with 30 specific instances of extortion from equipment lessors.

Torquato was found guilty of all 31 counts; George was found guilty of 30 counts and not guilty of one; Stevens was found guilty of two counts and not guilty of 29.

Following the trial Torquato and George each filed timely Motions for Judgment of Acquittal and a New Trial. In addition Torquato filed a Motion to Dismiss Indictment and a Motion for Evidentiary Hearing, these latter two motions being joined in orally by counsel for George and Stevens.

Appendix A.

I.

MOTION FOR NEW TRIAL; MOTION FOR JUDGMENT OF ACQUITTAL

After hearing oral arguments and carefully studying the briefs filed, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motions for New Trial and Motion for Judgment of Acquittal filed by defendants John R. Torquato and John George be and the same hereby are denied.

II.

MOTION TO DISMISS INDICTMENT; MOTION FOR EVIDENTIARY HEARING

During the years pertinent to the indictment (1971-1976) Torquato was Supervisor of County Audits in the Department of Auditor General for the Commonwealth of Pennsylvania and also chairman of the Democratic Committee of Cambria County, Pennsylvania. George was an assistant superintendent of PennDOT in Cambria County, and Stevens was a PennDOT foreman in Cambria County.

During the trial of this case counsel for Torquato averred that it was his understanding that there existed a report of a committee of the Pennsylvania House of Representatives investigating state contract practices in Cambria County, and he requested that the Government attorneys make it available to him. The Government attorneys stated that they had looked for but could not find the report; subsequent to the trial, they reported that they had found two reports and turned them over to Torquato's counsel. One is entitled "Final Report—Pennsylvania House of Representatives Select Committee on State Contract Practices" and is attached to Torquato's Motion as "Exhibit A." At the hearing on these motions the other Report was introduced at the request of the Court as "Court's Exhibit 1." Although Torquato's Exhibit A is entitled "Final Report," the face sheet also indicates it was an "Initial Draft" submitted by two men identified as "special counsel." Court's Exhibit 1 has no face sheet, but there was no dispute by the parties that Court's Exhibit 1 was actually the final report of the House Committee and that Torquato's Exhibit A was the initial draft.

Appendix A.

Torquato's Exhibit A will hereinafter be referred to as the "Initial Draft" and is attached hereto as "Appendix A." Court's Exhibit 1 will hereinafter be referred to as the "Final Report" and is attached hereto as "Appendix B."

Discriminatory law enforcement is unconstitutional as a denial of equal protection of the law. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Although Federal prosecutors have considerable discretion in selecting cases for prosecution, their selection may not be based on arbitrary standards. *Oyler v. Boles,* 368 U.S. 448, 456 (1962). In *Yick Wo,* the Supreme Court stated at 373-74:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Appendix A.

The steps which a defendant must take to accomplish the difficult task of establishing prosecutorial discrimination, or "selective prosecution," as it is sometimes called, has been well-defined in the cases. The defendant must make out a *prima facie* case of selective prosecution in order to obtain an evidentiary hearing on the question. *United States v. Falk,* 479 F.2d 616, 623 (7th Cir. 1973). As stated in *United States v.* Berrigan, 482 F.2d 171 (3d Cir. 1973) at 177:

> "Without denigrating the importance of the right of a person accused of crime to establish the presence of discriminatory prosecution, central to the issue must be some initial showing that there is a colorable basis for the contention."

Torquato relies on the following exhibits, attached to his motion, to establish the "colorable basis" for an evidentiary hearing:

A. The Initial Draft of the House Committee Report (Appendix A hereof).

B. A letter dated December 6, 1974, from the chairman of the House Committee, Patrick A. Gleason, to Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, transmitting a copy of the "Final Report—Pennsylvania House of Representatives Select Committee on State Contract Practices" (presumably Appendix B hereof) and stating that he understood Mr. Thornburgh already had "a copy of the draft of the Final Report, which was not approved by the Committee." (presumably Appendix A hereof).

Appendix A.

C. A letter dated December 3, 1974, from Caram J. Abood, district attorney of Cambria County, to Thornburgh asking Thornburgh to keep him informed of any investigation initiated by Thornburgh.

D. A letter dated January 9, 1975 from Abood to Thornburgh asking for a meeting "in regards to the Gleason Committee Report."

E. A letter dated April 2, 1975 from Samuel J. Orr, III, Assistant U. S. Attorney, to Abood, referring to Abood's letter of January 9, and suggesting a meeting with Orr the week of April 21, 1975.

F. A report of an interview with one Winfred F. Becker, dated June 7, 1972 (it is not clear what agency interviewed Becker) in which he recited that he had leased equipment to PennDOT "for the past eight years," that he had made "numerous annual contributions of $15.00, $20.00, and $30.00" to the Republican Administration. "Finally the leasers (sic) got together and decided they would rather give 5% of their fee to the party than make many small donations. This was done until the Democratic party took over. At this time he was told by GEORGE that he would be required to give a 5% kickback for the privilege of continuing to lease equipment to the state." The report then recites details of checks from Becker: one check for $44.00 dated January 6, 1971, payable to the Republican party and five checks payable to the Democratic party for $40.00, $52.00, $55.00, $64.00 and $58.00 dated between Febru-

ary 6, 1971 and April 9, 1971. The report of the interview concludes:

> "10. On June 13, 1972, BECKER was re-contacted and he advised insubstance (sic) that contrary to his previous verbal statement, he wanted it understood that all of his contributions were voluntary and that he had never been told that he would have to contribute."

G. A series of newspaper articles, letters to the editor and editorials about the case, culled from different Pennsylvania newspapers.

The chairman of the Republican party of Cambria County at this time was Robert Gleason. Torquato argues that it was the failure of the federal authorities to prosecute Gleason which makes the prosecution of Torquato selective and discriminatory.

While the exhibits described above are voluminous, it is our opinion that they lack the legal weight to constitute a "colorable" or *"prima facie"* indication of selective prosecution sufficient to require the court to order an evidentiary hearing.

The difference between the Initial Draft and the Final Report (Appendices A and B hereof) is that all of the names mentioned in the Initial Draft were dropped from the Final Report. We have no doubt, based on an analysis of these exhibits, that the United States Attorney's office had both versions of the Report.

A fair reading of the Initial Draft leads one to the conclusion that during the time both Gleason, the Republican, and Torquato, the Democrat, were Cambria County political chairmen, PennDOT employees were maced, the "macer" depending on which party controlled the Governor's office. Close study of the Initial Draft also leads one to the conclusion that extortion of money from equipment lessors was perpetrated *only* by Torquato and his associates.

The only indication that equipment lessors may have been extorted by the Republicans is Exhibit F, the report of the 1972 interview with Winfred Becker which recites payments to both parties and which concludes with the statement attributed to Becker that the payments were voluntary.

We are talking about two separate offenses here: (i) the macing of PennDOT employees and (ii) the extortion of money from lessors of equipment to PennDOT.

The macing of state employees does not fall under the Hobbs Act (18 U.S.C. §1951) if it does not affect interstate commerce. That would be a state offense. The extortion of money from equipment lessors is a Hobbs Act violation only if interstate commerce is affected. If either Gleason or Torquato were to be charged with the macing of employees it would have had to have been under state law, unless an effect on interstate commerce could, in the opinion of the United States Attorney, be proven.[1]

In the Federal proceeding Torquato was charged *only* with the offenses of extortion from lessors of equipment, not with macing employees. The jury was instructed by the court, *inter alia,* that it had to determine whether or not interstate commerce had been affected

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1. At the hearing on these motions, the Government attorney stated, in answer to a question from the court, that proving this jurisdictional element is especially difficult in the context of macing.

in these transactions, and the jury's verdict would indicate that it did so find.

Since there is insufficient evidence in the exhibits offered to establish a colorable basis for an evidentiary hearing, the motion must be denied.

The idea of a judicial opening of the files of a United States Attorney's office in an evidentiary hearing of the sort requested here is one which the courts must approach in circumspect fashion. The selection of prosecutions is a decision to be made by the executive branch of government. As stated in *United States v. Berrigan,* 482 F.2d 171 (3d Cir. 1973) at 180-181, quoting in part from *Newman v. United States,* 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (1967):

> " 'Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings or what precise charge shall be made, or whether to dismiss a proceeding once brought.' This basic principle of general application is premised on a recognition of the constitutional separation of powers. . . . There is a broad body of law recognizing the practical and legal necessity of vesting broad discretion in the government's attorneys with respect to their enforcement of the federal criminal laws." (citations omitted)

The court went on to cite from *Pugach v. Klein,* 193 F. Supp. 630, 635 (S.D.N.Y. 1961), various factors which influence the executive branch's decision to prosecute.

> " '[Some of the] considerations are the likelihood of conviction, turning on choice of a strong case to test uncertain law, the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing and the relative gravity of the offense. In weighing these factors, the prosecutor must apply responsible standards, based, not on loose assumptions, but, on solid evidence, balanced in a scale demanding proof beyond a reasonable doubt to overcome the presumption of innocence. . . . Still other factors are the relative importance of the offense compared with the competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these and numerous other intangible and imponderable factors must be carefully weighed and considered by the conscientious United States Attorney in deciding whether or not to prosecute. All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney.' "

We are of the opinion that opening the case for an evidentiary hearing on the grounds asserted by the defendants here would be an unwarranted intrusion by the judiciary on the discretion of the executive branch of government. For the reasons set forth above, It is HEREBY, ORDERED, ADJUDGED and DECREED that the Motion to Dismiss the Indictment and Motion for Evi-

dentiary Hearing be and the same are hereby denied as to all defendants.

MAURICE B. COHILL, JR.
United States District Judge

October 13, 1978

cc: Alexander H. Lindsay, Jr.
Asst. United States Attorney
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Appendix A
of
Memorandum Order

FINAL REPORT

PENNSYLVANIA HOUSE OF REPRESENTATIVES
SELECT COMMITTEE
ON
STATE CONTRACT PRACTICES

Initial Draft Submitted By: Stephen F. Freind,
Special Counsel
John Michael Willmann,
Special Counsel

To: Patrick A. Gleason, Chairman

On: November 26, 1974

"EXHIBIT A"

CAMBRIA COUNTY

INTRODUCTION

In August of 1974, this Committee conducted an investigation concerning the operation of the Cambria County PennDOT District No. 9-3. Prior to beginning this investigation, this Committee had requested, and received, from the Pennsylvania Department of Justice, copies of investigative reports detailing investigations by that department of the Cambria County PennDOT district in 1968 and again in 1972.

As is all too often the case, neither investigation by the Department of Justice resulted in any prosecutions or any type of official action. After reviewing both

reports, copies of which may be found in Appendix 8, 9, this Committee must again criticize the shoddy and ineffective performance of the Department of Justice in both 1968 and 1972. It appears to be the distressing truth that, while administrations may change, the poor quality of law enforcement displayed by the Department of Justice remains constant.

Specifically, the 1968 report tends to indicate that Department of Justice investigators made no attempt whatever to follow-up allegations of macing being practiced by certain PennDOT officials and Republican party figures.

In 1972 the Department of Justice investigation resulted in information which clearly indicated the existence of both macing and extortion of PennDOT lessors. Yet, despite the fact this information was obtained, prosecutions were neither recommended nor initiated.

In the short time which this Committee has been able to devote to Cambria County, it has developed information which clearly warrants further investigation by appropriate law enforcement agencies and, in all probability, prosecutive action.

It had been the intention of this Committee to conduct public hearings concerning the Cambria County PennDOT district in September or October of this year. Such hearings never took place because of the actions of the minority members of this Committee. After the Cambria County field investigation had been completed, the minority members of this Committee expressed a desire to conduct further investigations in Cambria County, which investigations would be exclusively directed by minority members and/or minority staff.

Because the Chairman of this Committee is from Cambria County, and because he insisted that the work of this Committee should in no way be hampered by even the appearance of impropriety or favoritism, the Chairman himself formally moved that the request of the minority members of this Committee be granted. In an effort to assist this further investigation, Special Counsel of this Committee provided to the minority copies of the results of the entire investigation conducted by this Committee in Cambria County.

Shortly thereafter, minority members of this Committee altered their course and stated that their staff lacked both manpower and expertise to conduct such an investigation. In view of this, the minority expressed a desire to hire a professional, non-partisan detective agency to accomplish that task. The majority quickly agreed to this proposal, and appropriate steps were taken to insure that this venture would be properly financed.

On September 18, 1974, the minority advised that the detective agency of E. J. Charters, Inc., had been hired to conduct the Cambria County investigation. The investigation was to begin in the near future, and was to be completed within two or three weeks time, after which public hearings would be held.

At the present time no investigation by either the minority or Charters firm has been conducted and no explanation has been given. It is extremely distressing that minority members of this Committee, who had repeatedly insinuated, often to the press, that Cambria County was sacrosanct because of the Chairman, would themselves thwart the efforts of this Committee through what can only be categorized as calculated inaction.

Despite these difficulties, however, the investigation of this Committee in Cambria County has revealed an appalling pattern of extortion of lessors and macing of PennDOT employees. Information provided by numerous employees makes it abundantly clear that, under both Republican and Democratic administrations, each employee was required to kickback 2% of his paycheck in order to retain his job. The information contained in this report and in Appendix 7, strongly indicates that Robert Gleason, Cambria County Republican Chairman, and John Torquato, Cambria County Democratic Chairman have directed the orchestration of these shakedown schemes.

The systematic 2% assessment of each employee was carried out under both administrations with businesslike precision. Shortly after the Democrats gained control in 1971, Torquato summoned all PennDOT employees to his office and, in addition to strongly suggesting that they switch their registration, advised them that he expected each employee to continue to follow the assessment program that was so successfully utilized by the Republicans.

The eventual unionization of PennDOT employees was only partially successful in decreasing the impact of this macing procedure. The AFSCME local in Cambria County must be commended for its efforts. In 1971, several PennDOT employees were fired for refusing the assessment demands placed upon them. The union filed suit in Federal Court and these employees were ultimately reinstated. At present, a PennDOT employee who refuses to make percentage payments will not, in all likelihood, be fired. His penalty, however, although more subtle, is almost as drastic. Numerous PennDOT

employees have provided information, contained in this report and the corresponding appendix, which clearly indicate that, when an employee refuses to contribute, he is invariably transferred to less desirable assignments which frequently necessitate traveling great distances from his home. Additionally, he no longer receives any overtime and is routinely passed over, regardless of his seniority, with respect to promotions.

In addition to the macing of employees, the investigation of this Committee has revealed that, at least under the present administration, certain lessors have been required to contribute 10% of their earnings from the state in order to continue to lease to PennDOT. Several of these lessors have stated that they fully realize that such a procedure has been mandated by John Torquato.

Because none of the information contained in this report has been received under oath, this Committee recommends that steps be taken by an appropriate law enforcement agency to confirm such information under oath, either by means of notarized statements or sworn testimony. If such action is taken, it is the opinion of this Committee that the result will be the prosecution of John Torquato on charges including Common Law Extortion, blackmail, violation of the Pennsylvania Anti-macing Statute and conspiracy.

This Committee's investigation indicates a widespread pattern of illegality which warrants further investigation by law enforcement authorities. There is no question that such an intensified investigation will result in the prosecution of other individuals, some of whom are mentioned in this report. In particular, it appears that John George, a PennDOT official who has

been employed under both administrations, has, for the most part, functioned solely as a collection agent for the above described coerced payments. Even without the benefit of any further investigation, this Committee must strongly urge that John George be immediately removed from his state position.

It may well be that the Statute of Limitations may bar the prosecution of Robert Gleason. Appropriate law enforcement authorities should look into this matter and ascertain whether or not any circumstances have occurred which might have tolled that statute. Additionally, Gleason's actions may also have violated federal law, in which case the more lengthy federal Statute of Limitations may not have yet run.

Although the inability of the Pennsylvania Department of Justice to function as an aggressive and efficient law enforcement agency has been evidenced in many areas, its inept performance in Cambria County is particularly glaring. Numerous individuals who have been interviewed by Committee investigators have been reluctant to cooperate because of a feeling of overwhelming futility. These individuals have pointed to the fact that the Department of Justice has conducted two major investigations in Cambria County within the last six years with absolutely no results.

Copies of this report, along with all pertinent data and evidence will be sent to the Secretary of Transportation, as well as the following agencies:

The United States Attorney for the Western District of Pennsylvania

The United States Attorney for the Middle District of Pennsylvania

The District Attorney of Cambria County

The District Attorney of Dauphin County

The Pennsylvania Crime Commission

The Office of the Attorney General of Pennsylvania

FINDINGS OF FACT

I. Lawrence Sherbine has provided the signed statement to investigators of this Committee. In his signed statement Sherbine advised that he has leased to PennDOT since 1932. In 1971, after the Democrats took control of PennDOT, PennDOT Foreman John George began personally delivering to Sherbine his State paychecks and instructing Sherbine to make cash payments to him of 5% of his paycheck. This procedure continued through the snow removal season of 1971-1972, and during that season the percentage was increased to 10%.

Sherbine's paychecks were given to him in envelopes and on the envelopes were noted the percentage which he was expected to pay. Once during that snow removal season, Sherbine attempted to give George a check but George refused stating that "John doesn't want any checks." Sherbine realized that George was referring to John Torquato, Chairman of the Cambria County Democratic Committee. On the occasion that George refused a check, Sherbine's bookkeeper, John B. Adams was also present. Because of George's refusal to except the check Sherbine went to a bank, cashed the check, and gave George $360 in cash.

George once advised to Sherbine that he did not want to make any mistakes on the amount which Sherbine was to pay because "I made a $10 mistake on another man and John made me pay it out of my pocket." Again, Sherbine stated that George was referring to John Torquato.

Sherbine advised that he stopped keeping track of the "Kickbacks" he made during the 1971-1972 snow removal season after the amount reached $1,700.

During the 1972-1973 snow removal season, Sherbine's equipment did $1,300 worth of work without Sherbine making any payments. Sherbine then received a telephone call which he believed was from Assistant Superintendent, Anthony Maruca. During the conversating Maruca asked Sherbine "Do you have our envelope?" Sherbine replied that he did and was advised that someone would pick it up. Sherbine then changed his mind, refused to pay, and later told Maruca that he no longer wished to lease to PennDOT.

When interviewed by investigators of this Committee, Anthony Maruca denied that he had ever requested or received political contributions from lessors.

John B. Adams, Sherbine's bookkeeper, has provided a signed statement to investigators of this Committee in which he fully corroborates Sherbine's statement. Adams advised that he remembered a specific occasion when a man came to see Sherbine. During the conversating between Sherbine and the man, Adams heard the man refuse to except the check. Sherbine had previously advised Adams that he was making percentage payments to John Torquato. After the man left, Adams asked Sherbine who the man was and Sherbine replied that the man was John George. Adams also

stated that he was aware that other lessors were also making percentage payments.

II. Robert Noel was interviewed by investigators of this Committee and advised that he had leased to PennDOT for approximately 13 years, mostly during snow removal season. Until the present administration took over, Noel would make periodic voluntary contributions to the Republican Party in amounts ranging from $10 to $20. According to Noel, when the present administration took over he began to feel pressure and the need to donate as much money as he could. Noel advised that during the last several years he has given as much as $200 to $300, as many as 3, 4 or 5 times a year. He explained this by saying that he needed the work and that he needed to protect himself.

Noel advised that on most occasions he made his payments, which were always in cash, to a PennDOT foreman named Stevens. He was never given a receipt.

III. Edward Bender has been interviewed by investigators of this Committee and has advised that he has leased equipment to PennDOT since approximately 1961. In 1971, after the Democrats took control of PennDOT, Bender was called by foreman John George to come to the highway shed to pick up his check. When Bender arrived for his check, George handed him the check in an envelope. On the envelope was written a figure which Bender was to give George. This figure was 10% of the amount of the paycheck.

Bender became furious and refused to pay and was never again contacted to make a payment. He ceased leasing to PennDOT in 1973.

IV. Charles J. Merlo was interviewed by investigators of this Committee. He advised that in 1972 he received a leasing contract from PennDOT and discussed receiving the contract with either Assistant Superintendent Anthony Maruca or foreman John George. When Maruca went to the highway shed to sign his contract, he was advised by George that he would be required to make regular payments totaling 10% of each paycheck. To the best of Maruca's recollection, George initially hand delivered each check to Maruca and later mailed the checks. Maruca advised that he paid 10% during the entire snow removal season of 1972 and 1973.

Gwen Morgan and Marilyn McMullen, Maruca's bookkeepers, also advised that Maruca was forced to make 10% kickback payments. Maruca's wife also gave Committee investigators the same information. Whenever a PennDOT check was received, Miss Morgan would figure how much 10% of the check was, go to a bank and cash a check for that exact amount and then place the cash in an envelope. John George would come several days later and pick up the envelope, always during working hours. Neither Maruca nor his bookkeepers could estimate how much they paid to George but advised that, if necessary, they would conduct an audit of their books to arrive at an exact figure.

MACING

V. Sam Marion has been interviewed by investigators of this Committee and has stated that he has been a PennDOT employee for approximately 12 years. During the time that PennDOT was controlled by the Republican Administration, Marion always paid 2% of his pay to one Ernie Gibson, a now deceased former

PennDOT employee, who worked under both Democratic and Republican Administrations. Marion would pay sometimes by check and sometimes by cash. He always received a receipt.

In 1971 after PennDOT employees became unionized, Marion refused to pay and was constantly harrassed by PennDOT foreman John George. In that same year, Marion was one of 5 men laid off for failing to make payments. The union brought suit in Federal Court and Marion was eventually reinstated.

VI. Bernard Illig advised investigators of this Committee that he has been a PennDOT employee for 22 years. Prior to 1971 he always paid 2% of his pay and, according to Illig, this was necessary to retain his job. According to Illig this 2% requirement was originated by Cambria County Republican Chairman Robert Gleason, but has been continued by the Democratic Administration. Illig advised that under the Democrats, it was an unspoken rule that an employee would pay or be transferred to less desirable positions.

VII. Richard Davis has provided a signed statement to investigators of this Committee indicating that he is a PennDOT employee and during the summer of 1971 he was laid off for refusing to pay a "kickback". Through union intervention, he was later reinstated. Davis advised that John George told him that if he was Davis' boss, he would fire him because, "you won't pay the kickback." Later, Superintendent Joseph Balko asked Davis why he wasn't paying and stated that by refusing to pay, Davis was breaking a promise to John Torquato. Davis advised that under the Republican Administration, before the union came into existence, he always paid a straight 2% of his wages.

VIII. Bertram Cauffiel has advised investigators of this Committee that until PennDOT employees became unionized, all employees were forced to make political payments in order to keep their jobs. Even after the advent of the union, and until this date, attempts were made to require employees to pay "kickbacks."

Cauffiel has advised John Torquato that he would no longer pay kickbacks, and, because of this, he has been frequently transferred and passed over for promotions.

IX. Richard Baum has advised investigators of this Committee that he makes percentage payments to PennDOT foreman Harold Stevens. In addition, Baum advised that approximately 80% of the PennDOT employees in Cambria County make similar payments ....is been previously told by John Torquato that "he would be better .....

X. William Gephardt ..... investigators of this Committee that he has been a PennDOT employee ..... Under the Republican Administration, Gephardt regularly paid 2% of ..... order to retain his job.

When the Democrats ..... all PennDOT employees were called to a meeting in John .... Torquato advised the employees that they would be expected to ..... contributions as they had under the Republicans. Gephardt ..... he had been personally approached by Torquato concerning ..... paying 2% of his salary. After PennDOT employees became ..... Gephardt ceased making the 2% payments but was not harrassed.....

opinion, he is a shed mechanic and it would be extremely ..... him transferred.

XI. Clyde Kerr ..... of this Committee that he was a PennDOT employee ..... May of 1974. Under the Republican Administration, ... were required to make percentage payments based on ..... Gibson collected the money. According to Kerr ..... former Superintendent Mylesko instructed Gibson ..... checks from PennDOT employees until the percentage ..... made. The percentage usually required was 2%.

According to Kerr, John George, a PennDOT employee under both Administrations, had been the "bagman" for both Robert Gleason, Cambria County Republican Chairman and, later, John Torquato, Cambria County Democratic Chairman. George collects the money on PennDOT time and, besides collecting the money, does little else. Under the Republican Administration, Robert Gleason came to the PennDOT shed every pay day to receive the money which George had collected.

After PennDOT employees became unionized, Kerr stopped making payments. Because of his refusal to pay, he no longer received any overtime. He advised that any union employees who refused to pay were transferred or threatened with transfer.

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*Dots represent missing words in original copy.

Appendix B
of
Memorandum Order

CAMBRIA COUNTY

INTRODUCTION

In August of 1974, this Committee conducted an investigation concerning the operation of the Cambria County PennDOT District No. 9-3. Prior to beginning this investigation, this Committee had requested, and received, from the Pennsylvania Department of Justice, copies of investigative reports detailing investigations by that department of the Cambria County PennDOT district in 1968 and again in 1972.

As is all too often the case, neither investigation by the Department of Justice resulted in any prosecutions or any type of official action. After reviewing both reports, copies of which may be found in Appendix 8, 9, this Committee must again criticize the shoddy and ineffective performance of the Department of Justice in both 1968 and 1972. It appears to be the distressing truth that, while administrations may change, the poor quality of law enforcement displayed by the Department of Justice remains constant.

In 1972 the Department of Justice investigation resulted in information which clearly indicated the existence of both macing and extortion of PennDOT lessors. Yet, despite the fact this information was obtained, prosecutions were neither recommended nor initiated.

In the short time which this Committee has been able to devote to Cambria County, it has developed information which clearly warrants further investigation by appropriate law enforcement agencies.

It has been the intention of this Committee to conduct public hearings concerning the Cambria County PennDOT district in September or October of this year. Such hearings never took place because of the actions of the minority members of this Committee. After the Cambria County field investigation had been completed, the minority members of this Committee expressed a desire to conduct further investigations in Cambria County, which investigations would be exclusively directed by minority members and/or minority staff.

Because the Chairman of this Committee is from Cambria County, and because he insisted that the work of this Committee should in no way be hampered by even the appearance of impropriety or favoritism, the Chairman himself formally moved that the request of the minority members of this Committee be granted. In an effort to assist this further investigation, Special Counsel of this Committee provided to the minority copies of the results of the entire investigation conducted by this Committee in Cambria County.

Shortly thereafter, minority members of this Committee altered their course and stated that their staff lacked both manpower and expertise to conduct such an investigation. In view of this, the minority expressed a desire to hire a professional, non-partisan detective agency to accomplish that task. The majority quickly agreed to this proposal, and appropriate steps were taken to insure that this venture would be properly financed.

On September 18, 1974, the minority advised that the detective agency of E. J. Charters, Inc., had been hired to conduct the Cambria County investigation.

The investigation was to begin in the near future, and was to be completed within two or three weeks time, after which public hearings would be held.

At the present time no investigation by either the minority or Charters firm has been conducted and no explanation has been given. It is extremely distressing that minority members of this Committee, who had repeatedly insinuated, often to the press, that Cambria County was sacrosanct because of the Chairman, would themselves thwart the efforts of this Committee through what can only be categorized as calculated inaction.

Despite these difficulties, however, the investigation of this Committee in Cambria County has revealed an appalling pattern of extortion of lessors and macing of PennDOT employees. Information provided by numerous employees makes it abundantly clear that, under both Republican and Democratic administrations, each employee was required to kickback 2% of his paycheck in order to retain his job. See Appendix 7.

The eventual unionization of PennDOT employees was only partially successful in decreasing the impact of this macing procedure. The AFSCME local in Cambria County must be commended for its efforts. In 1971, several PennDOT employees were fired for refusing to assessment demands placed upon them. The union filed suit in Federal Court and these employees were ultimately reinstated. At present, a PennDOT employee who refuses to make percentage payments will not, in all likelihood, be fired. His penalty, however, although more subtle, is almost as drastic. Numerous PennDOT employees have provided information, contained in this report and the corresponding appendix, which clearly indicate that, when an employee refuses to contribute, he is invariably

transferred to less desirable assignments which frequently necessitate traveling great distances from his home. Additionally, he no longer receives any overtime and is routinely passed over, regardless of his seniority, with respect to promotions.

In addition to the macing of employees, the investigation of this Committee has revealed that, at least under the present administration, certain lessors have been required to contribute 10% of their earnings from the state in order to continue to lease to PennDOT.

Because none of the information contained in this report has been received under oath, this Committee recommends that steps be taken by an appropriate law enforcement agency to confirm such information under oath, either by means of notarized statements or sworn testimony.

This Committee's investigation indicates a widespread pattern of illegality which warrants further investigation by law enforcement authorities.

Although the inability of the Pennsylvania Department of Justice to function as an aggressive and efficient law enforcement agency has been evidenced in many areas, its inept performance in Cambria County is particularly glaring. Numerous individuals who have been interviewed by Committee investigators have been reluctant to cooperate because of a feeling of overwhelming futility. These individuals have pointed to the fact that the Department of Justice has conducted two major investigations in Cambria County within the last six years with absolutely no results.

Appendix A.

Copies of this report, along with all pertinent data and evidence will be sent to the Secretary of Transportation, as well as the following agencies:

The United States Attorney for the Western District of Pennsylvania

The United States Attorney for the Middle District of Pennsylvania

The District Attorney of Cambria County

The District Attorney of Dauphin County

The Pennsylvania Crime Commission

The Office of the Attorney General of Pennsylvania

Appendix B.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2577

UNITED STATES OF AMERICA
v.
TORQUATO, JOHN R.
Appellant
(D.C. Crim. No. 77-00272-01)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA—PITTSBURGH

Argued June 6, 1979
Before: WEIS, GARTH, *Circuit Judges*, and GERRY,*
District Judge
(Opinion filed July 5, 1979)

ROBERT J. CINDRICH
United States Attorney
ALEXANDER H. LINDSAY, JR.
(Argued)
Assistant US Attorney
633 US Post Office & Courthouse
Pittsburgh, PA 15219
Attorneys for Appellee

THOMAS A. LIVINGSTON, ESQ.
(Argued)
DENNIS J. CLARK, ESQ.
205 Ross Street—
Colonial Bldg.
Pittsburgh, PA 15219
Attorneys for Appellant

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*The Honorable John F. Gerry, United States District Judge for the District of New Jersey sitting by designation.

Appendix B.

Opinion of the Court

GARTH, *Circuit Judge*

John R. Torquato appeals from the judgment of sentence entered upon his conviction for conspiring with others to violate the Hobbs Act, 18 U.S.C. § 1951, and for substantive violations of that Act. He raises a number of legal issues on appeal, only one of which we think merits discussion. This one issue is whether Torquato made a sufficient threshold showing of selective prosecution to entitle him to an evidentiary hearing in which he could explore the factual predicate for his claim of unlawful discrimination on the part of the government in subjecting him to prosecution.

Based upon our review of the evidence presented to the district court, we conclude that Torquato failed to establish a showing of selective prosecution sufficient to entitle him to an evidentiary hearing. Additionally, we hold that his other claims are without merit. We therefore affirm Torquato's judgment of sentence.

I

The evidence adduced at trial indicates that from 1971 to 1976 Torquato, along with John George and Harold G. Stevens,[1] extorted funds from persons who

1. A thirty-one count indictment was returned against Torquato and co-defendants John George and Harold G. Stevens. The first count charged Torquato, George, and Stevens with conspiracy to violate the Hobbs Act. The remaining thirty counts charged thirty specific instances of extortion from equipment lessors.

Torquato was found guilty of all thirty-one counts. George was found guilty of thirty counts, and not guilty of one. Stevens was found guilty of two counts, and not guilty of twenty nine.

Appendix B.

leased heavy equipment to the Pennsylvania Department of Transportation ("PennDOT") in Cambria County, Pennsylvania. Torquato was the County Chairman of the Democratic Party in Cambria County from 1971 until 1978. He also held the position, during the years relevant to the indictment, of Supervisor of County Audits in the Department of Auditor General for the Commonwealth of Pennsylvania. During all times relevant to this case, George was an Assistant Superintendent of Highways for PennDOT in Cambria County.

According to testimony at trial, Torquato, because of his position as County Chairman, held *de facto* power to determine who would obtain work or contracts with PennDOT in Cambria County. Several lessors of heavy equipment testified that they had meetings with Torquato in which they sought his approval to enter into leases with PennDOT. During these meetings, Torquato would indicate that the *quid pro quo* for obtaining a lease with the state would be payment of a percentage kickback "to the party." It was the understanding of the lessors, as reflected in their testimony, that PennDOT would lease their equipment only if they made such kickbacks. In 1971, the required payment was five percent of a lessor's gross income from PennDOT. This amount was increased to ten percent in the fall of 1972.[2]

Most of the kickback payments were collected by George. Several witnesses testified that George would

We have disposed of Torquato's appeal in this opinion. George's appeal has been decided in United States v. George, No. 78-2560 (3d Cir. filed July 5, 1979) (per curiam). Stevens's appeal is not before us.

2. According to trial testimony, payments were initially made by check. After May, 1971, however, Torquato required that all payments be made in cash.

come to their place of business or job site to collect a percentage payment at the time of the arrival of their twice monthly rental payment from PennDOT. According to a number of government witnesses, when George collected money or discussed payments with them, he would indicate that he was acting under the direction of Torquato. George himself testified that he collected money from various lessors of equipment in Cambria County, and that he did so at the behest of Torquato.[3] He further testified that when he collected the money, he would immediately turn it over to Torquato.

Although the kickback payments made by the lessors were often characterized at trial as "political donations" or "contributions", the evidence would indicate that these payments benefited Torquato personally, and not the Democratic Party. With respect to those payments made by check, an employee of the Laurel National Bank testified that the checks had been cashed rather than deposited in any account.[4] This testimony was corroborated by that of Janell Morana, a secretary for the Cambria County Democratic Committee. Morana testified that she received all of the Party's money, recorded it, and deposited it into appropriate accounts. After examining the kickback checks that had been submitted into evidence, she testified that she had cashed them all at the direction of Torquato. When the checks

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3. George testified that before embarking on his collection duties, he would receive from Torquato a list of various persons leasing equipment to PennDOT, the income those persons received from PennDOT, and the amount of money that Torquato claimed was due him from those persons.

4. The bank employee was able to make this determination based on information encoded on the checks.

were cashed, the proceeds were placed in an envelope and returned to Torquato. Morana further testified that at the time George was collecting large sums of cash from various lessors, she received no cash to deposit in the Party's account.

In addition to the foregoing, the government introduced evidence that the activities of the lessors affected interstate commerce and that Torquato and George attempted to impede an investigation of their activities conducted by the Federal Bureau of Investigation. On June 29, 1978, a jury found Torquato guilty of conspiring to violate the Hobbs Act, and of various substantive violations of that Act.

During the trial of this case, Torquato's attorney requested that the government make available to him a report which he understood had been prepared by a committee of the Pennsylvania House of Representatives investigating state contract practices in Cambria County. In response to the request, the government attorneys stated that they had looked for but could not find the report. Subsequent to the trial, they disclosed that they had found two reports and turned them over to Torquato's counsel. One report is entitled "Final Report—Pennsylvania House of Representatives Select Committee on State Contract Practices." However, the cover sheet indicates that it is an "Initial Draft" submitted by two men identified as "special counsel". (Hereinafter, this report will be referred to as the "Initial Draft"). The other report, as it appears in the record, lacks a cover sheet. Nonetheless, the parties are in agreement that this report is actually the final report of the House Committee. (Hereinafter, this report will be referred to as the "Final Report").

Based on the information contained in these reports, as well as on other evidence submitted to the district court, Torquato filed post-trial motions to dismiss the indictment and to accord him an evidentiary hearing on the issue of selective prosecution.[5] The basis for these post-trial motions was the claim that the United States Attorney for the Western District of Pennsylvania possessed information which indicated that Robert Gleason, Chairman of the Republican Party in Cambria County, had extorted funds from lessors when the Republican Party was in office prior to 1971. Torquato argued that the failure of the United States Attorney to prosecute Gleason within the statute of limitations period,[6] despite this evidence, made his own prosecution discriminatory and unlawful. He contended that they had made a sufficient prima facie showing to be entitled to an evidentiary hearing on this issue, and that the appropriate remedy for such selective prosecution was dismissal of the indictment. His post-trial motions were denied by the district court, and this appeal followed.

II

The government is not entirely unconstrained in its choice of those whom it will prosecute. As long ago as *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), Justice Matthews wrote for the Supreme Court that "if [a law]

5. Torquato also moved for a new trial and for a judgment of acquittal. Both of these motions were denied by the district court.

6. Torquato suggests that the statute of limitations for a Hobbs Act prosecution of Gleason expired on January 19, 1976. Brief for Appellant Torquato at 12. Without deciding the issue, for purposes of this case we will assume that prosecution of Gleason is now barred by the statute of limitations.

is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373-74. To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias. "Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *United States v. Berrios,* 501 F.2d 1207, 1209 (2d Cir. 1974). It is the wisdom of our constitution that such personal abuses of governmental power are proscribed.[7]

In considering a claim of selective prosecution in *United States v. Berrigan,* 482 F.2d 171, 174 (3d Cir. 1973), this court stated that "although the government is permitted 'the conscious exercise of some selectivity' in the enforcement of its criminal laws, *Oyler v. Boles,* 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446 (1962), any 'systematic discrimination' in enforcement, [*United States v. Robinson,* 311 F. Supp. 1063, 1065 (W.D. Mo. 1969)], or 'unjust and illegal discrimination between persons in similar circumstances,' *Yick Wo,*

7. Federal prosecutors are governed by the equal protection principle of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

supra, 118 U.S. at 374, 6 S. Ct. at 1073, violates the equal protection clause and renders the prosecution invalid." Unequal application of the criminal laws does not amount to a constitutional violation, however, "unless there is shown to be present in it an element of intentional or purposeful discrimination". *Snowden v. Hughes,* 321 U.S. 1, 8 (1944).[8] *See Washington v. Davis,* 426 U.S. 229 (1976). The burden of proving such discrimination is placed upon the defendants. *United States v. Malinowski,* 472 F.2d 850, 860 (2d Cir. 1973).[9]

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8. The concept of "intentional and purposeful discrimination" was explained in United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974), as follows:

> To support a defense of selective or discriminatory [sic] prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."

9. In Oyler v. Boles, 368 U.S. 448 (1962), the Supreme Court rejected a claim of selective prosecution on the ground that "it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 456. Following this decision, there was some question whether a defendant claiming selective prosecution was required to show that he or she was a member of a class against which the law was being selectively enforced. *See* The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54, 120-21 (1962). Our decision in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), implicitly assumed that relief would be available when intentional or purposeful discrimination was practiced against an individual (even though the discrimination was not class-based), and we agree with other decisions which have reached that result. *E.g.,* United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973) (en banc); Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963). Thus, although we may assume for this case that prosecutorial decisions based on the defendants' membership in one political party or another is the sort of "arbitrary classification" contemplated by Oyler v. Boles, 368 U.S. at 456, it is clear that Torquato could raise his claim of selective prosecution based on individual discrimination. Moreover, membership in a political party is protected by the First Amendment, and the mere exercise of that right cannot be punished by means of selective prosecution. *See* United States v. Falk, *supra;* United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).

Although the government is held accountable under the constitution so that it may not engage in selective prosecutions, courts have endeavored to create procedural mechanisms by which defendants may raise such claims without interfering unduly with the broad prosecutorial authority vested in the executive branch. The concept of separation of powers underlies the courts' concern that the prosecutorial function be relatively untrammeled. *See United States v. Johnson,* 577 F.2d 1304, 1307 (5th Cir. 1978). This is especially true at the incipient stages of a prosecution. "In formulating and prosecuting its case, the government must be relatively unconstrained in its deployment of resources. The choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control." *United States v. Herman,* 589 F.2d 1191, 1210 (3d Cir. 1978) (Garth, J., concurring in part and dissenting in part), *cert. denied,* 47 U.S.L.W. 3684 (U.S. April

17, 1979).[10] These separation of powers concerns are reinforced by the presumption that "a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." *United States v. Falk,* 479 F.2d 616, 620 (7th Cir. 1973) (en banc).

In order to minimize the intrusion on the prosecutorial function and still enable a defendant effectively to raise a claim of selective prosecution, the defendant is obligated to make a threshold showing of discriminatory prosecution before an evidentiary hearing will be accorded on this issue. *United States v. Berrigan,* 482 F.2d 171, 181 (3d Cir. 1973); *United States v. Union Nacional de Trabajadores,* 576 F.2d 388, 395 (1st Cir. 1978); *United States v. Wallace,* 578 F.2d 735, 740 (8th Cir.), *cert. denied* 99 S. Ct. 263 (1978); *United States v. Oaks,* 508 F.2d 1403, 1404 (9th Cir. 1974); *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974). *See United States v. Falk,* 479 F.2d 616, 620-21 (7th Cir. 1973) (en banc); *United States v. Steele,* 461 F.2d 1148, 1152 (9th Cir. 1972); *United States v. Crowthers,* 456 F.2d 1074, 1078 (4th Cir. 1972). The defendant bears the burden of proving a "colorable entitlement", *United States v. Berrigan,* 482 F.2d at 181, to the claim of selective prosecution. Some credible evidence must be adduced indicating that the government intentionally and purposefully dis-

10. Decisions made by the government concerning the initiation of prosecution will not usually affect the availability of relevant evidence at trial in such a way as to invoke the court's interest in the accuracy of the trial process. *See* United States v. Herman, 589 F.2d 1191, 1205 (Garth, J., concurring in part and dissenting in part), *cert. denied,* 47 U.S.L.W. 3684 (U.S. April 17, 1979).

criminated against the defendant by failing to prosecute other similarly situated persons.

III

Our view of the evidence adduced by Torquato in support of his claim of selective prosecution leads us to agree with the district court that he has not made a sufficient threshold showing of selective prosecution to entitle him to an evidentiary hearing.

The principal evidence upon which Torquato relies is the Initial Draft and Final Report of the Pennsylvania House of Representatives Select Committee on State Contract Practices.[11] Neither of these reports supports their position, however. These reports state that under both Republican and Democratic administrations, Party officials in Cambria County engaged in an extensive practice of "macing" PennDOT employees —i.e., each employee was required to kickback 2% of his paycheck in order to retain his job. Notably, however, with respect to the extortion of persons leasing equipment to PennDOT, the Initial Draft states:

> In addition to the macing of employees, the investigation of this Committee has revealed that, at least under the present [Democratic] administration, certain lessors have been required to contribute 10% of their earnings from the state in order to continue to lease to PennDOT. Several

11. The only difference between the Initial Draft and the Final Report is that all names mentioned in the former were expurgated from the latter. The district court concluded that the United States Attorney's Office "had both versions of the Report." That determination has not been challenged on appeal.

> of these lessors have stated that they fully realize that such a procedure has been mandated by John Torquato.

Thus, by its terms, the report identified only the Democratic administration, and John Torquato, as having extorted kickbacks from equipment lessors.[12]

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12. It appears that the evidence received by the Committee enabled it to conclude that only under the Democratic administration were kickbacks actually extorted. There was testimony to the effect that payments made under the Republican administration were voluntary, but that they became compulsory under the Democratic administration. For example, the Initial Draft summarizes the information provided by Robert Noel, an equipment lessor, as follows:

> II. Robert Noel was interviewed by investigators of this Committee and advised that he had leased to PennDOT for approximately 13 years, mostly during snow removal season. Until the present administration took over, Noel would make periodic voluntary contributions to the Republican Party in amounts ranging from $10 to $20. According to Noel, when the present administration took over he began to feel pressure and the need to donate as much money as he could. Noel advised that during the last several years he has given as much as $200 to $300, as many as 3, 4 or 5 times a year. He explained this by saying that he needed the work and that he needed to protect himself.

Torquato calls our attention to the trial testimony of certain government witnesses which he contends establishes that Republican Party officials extorted kickbacks from equipment lessors. We have reviewed this testimony, and find it consistent with other evidence indicating that payments made during the Republican administration were not coerced. Moreover, to the extent such testimony does not suggest that Republican Party officials extorted kickbacks, Torquato has made no showing that the government had access to this information

The other evidence relied upon by Torquato to establish a threshold showing of selective prosecution does not contradict the basic conclusion of the Committee reports that macing was engaged in by both Democratic and Republican officials, but that extortion of kickbacks from equipment lessors was solely the practice of Democratic officials. Correspondence between the Cambria County District Attorney and the United States Attorney's Office contains no substantive information concerning the illegal practices of officials under either the Democratic or Republican administrations. The correspondence reflects no more than arrangements for a meeting between the two offices in order to discuss the Committee's Final Report.[13] A summary of two interviews conducted by State investigators with Becker, an equipment lessor, indicates that Becker considered all payments made under both the Democratic and Republican administrations to be voluntary.[14] The newspaper articles upon which Tor-

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prior to January 19, 1976, the date the statute of limitations purportedly barred prosecution of Republican Party officials. *See* note 5 *supra*.

13. Torquato apparently also relies on a letter sent to the United States Attorney by Patrick Gleason, Chairman of the House of Representatives Select Committee on State Contract Practices. However, this was merely a cover letter under which the Committee's Final Report was forwarded to the United States Attorney; the letter itself contains no substantive information.

14. Although Becker claimed in a June 13, 1972 interview that all payments he made were voluntary, his June 7, 1972 interview suggests that the Democrats exerted greater pressure than did the Republicans in the solicitation of these contributions. The synopsis of the June 7th interview states:

quato relies recount the information contained in the Committee reports, report on the trial of Torquato, and discuss statements made in interviews with various persons involved in the investigation. These articles do not, however, suggest the existence of any evidence concerning the extortion by Republican Party officials of kickbacks from equipment lessors.

In sum, the evidence adduced by Torquato in support of his claim of selective prosecution reveals that employees of PennDOT were maced under both the Democratic and Republican administrations. It also reveals that there was evidence that officials under the Democratic administration—namely Torquato and George—extorted kickbacks from persons leasing equipment to PennDOT. Significantly, however, the evidence does not disclose that officials under the Republican administration extorted payments from equipment lessors.

Torquato was prosecuted under the Hobbs Act only for extorting kickbacks from equipment lessors. He was not prosecuted for macing PennDOT employees.

BECKER related in substance that he and his brother have rented a high-lift vehicle to the State for the past eight years. This vehicle was used for loading ashes. He stated that during his first several years of leasing equipment to the Commonwealth under the Republican Administration, he made numerous annual contributions of $15.00, $20.00 and $30.00. Finally the leasors got together and decided that they would rather give 5% of their fee to the party than make many small donations. This was done until the Democratic party took over. At this time he was told by GEORGE that he would be required to give a 5% kickback for the privilege of continuing to lease equipment to the State.

In commencing this prosecution, the government could rightfully differentiate between Torquato and Democratic Party officials, on the one hand, and Republican Party officials, on the other, because the Committee reports to which the government had access identified only Democratic Party officials as extorting funds from equipment lessors. Furthermore, the government could understandably refuse to prosecute both Democrats and Republicans for macing PennDOT employees because of the difficulty in establishing that such macing affected interestate commerce—a requisite element of proof in a Hobbs Act prosecution.[15]

The evidence discloses that Gleason, the Republican Party County Chairman, was simply not similarly situated to Torquato with respect to the criminal activity prosecuted by the government. We are therefore satisfied that in the complete absence of evidence that Republican Party officials engaged in the type of activity with which Torquato was charged, the government did not engage in any intentional or purposeful discrimination in proceeding against Torquato. Moreover, the government could do so while at the same time it decided not to seek indictments or prosecute for any macing activities engaged in by officials of either political party. Consequently, we conclude that Torquato failed to make a sufficient threshold showing to be entitled to an evidentiary hearing on the issue of selective prosecution.

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15. At a hearing in the district court on Torquato's motions to dismiss the indictment or hold an evidentiary hearing, the government attorney stated, in response to a question from the court, that proving an effect on interstate commerce is especially difficult with respect to macing of state employees.

IV

Torquato also contends that there was no evidence of an effect on interstate commerce sufficient to sustain his conviction under the Hobbs Act. A similar argument was advanced in *United States v. Cerilli,* Nos. 78-2105/07, 78-2439 (3d Cir. filed June 29, 1979), a case involving facts virtually identical to those presented on this appeal. The court in *Cerilli* rejected the contention that extortion of kickbacks from equipment lessors involved an insufficient effect on interstate commerce to sustain Hobbs Act convictions. Considering ourselves bound by *Cerilli,* we hold that Torquato's activities affected interstate commerce to a degree sufficient to sustain his conviction.

Torquato raises the following additional issues:

"II. Whether the lower court erred in refusing to allow defendant-appellant Torquato to inquire into the financial condition of a co-defendant on cross-examination under the particular circumstances of this case and in view of this Court's decision in *United States v. Kenny,* 462 F.2d 1205 (3d Cir. 1972)?

"III. Whether defendant-appellant Torquato was deprived of his constitutional rights to the due process of law and to have compulsory process for obtaining witnesses in his favor as a result of the lower court's erroneous refusal to admit defense testimony in regard to PennDOT lessors, who viewed the payments to political parties as voluntary and declined to contribute yet retained their PennDOT contracts?

"IV. Whether the lower court erred in refusing defendant-appellant Torquato's repeated motions for mistrial on the basis of admission of testimony of Government witnesses as to statements by George, an alleged co-conspirator, after the conspiracy had terminated?

"V. Whether the evidence is sufficient to sustain the conviction of defendant-appellant Torquato under 18 U.S.C. §1951, the "Hobbs Act"?

"VI. Whether, in view of the substantial prejudice arising from the joinder of defendants in the indictment, the lower court abused its discretion by denying defendant-appellant Torquato's motions for severance?

"VII. Whether the admission of evidence concerning the affect of defendant-appellant Torquato's activities on foreign commerce was improper and resulted in an impermissible broadening of the scope of the indictment which only alleged an affect on interstate commerce?"

Brief for Appellant Torquato at 2-3. We have examined each of these issues, and find them to be without merit.

V

For the foregoing reasons, the judgment of sentence entered on the conviction of Torquato will be affirmed.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2577

UNITED STATES OF AMERICA

v.

TORQUATO, JOHN R.

Appellant

Sur Petition for Rehearing

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, Circuit Judges and GERRY*, District Judge

The petition for rehearing filed by John R. Torquato, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

.....
Judge

Dated: August 1, 1979

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*The Honorable John F. Gerry, United States District Judge for the District of New Jersey sitting by designation.

No. 79-318

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN R. TORQUATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-318

JOHN R. TORQUATO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1979. A petition for rehearing was denied on August 1, 1979. The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by limiting petitioner's cross-examination of his co-defendant.

2. Whether the trial court erred in declining to permit petitioner to introduce proof showing that his conduct was lawful on occasions different from those described in the indictment.

3. Whether the evidence was sufficient to prove that petitioner's extortionate scheme affected interstate commerce.

4. Whether an evidentiary hearing should have been granted on petitioner's claim of selective prosecution.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of conspiracy to violate the Hobbs Act, and on thirty counts alleging substantive violations of the Act, in violation of 18 U.S.C. 2 and 1951. He was sentenced to five years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B).[1]

The evidence at trial, which is summarized by the court of appeals (Pet. App. 30a-34a), showed that petitioner, along with co-defendants John George and Harold Stevens, employed extortion to obtain kickbacks from persons who leased heavy equipment to the Pennsylvania Department of Transportation in Cambria County, Pennsylvania. At the relevant time, petitioner was County Chairman of the Democratic Party in Cambria County. Co-defendant George was the Assistant Superintendent of Highways for the Department of Transportation. Co-defendant Stevens was a foreman responsible for

[1]Co-defendant John George was convicted on one conspiracy count and twenty-nine substantive counts; co-defendant Harold Stevens was convicted of conspiracy and two substantive violations.

construction projects. By virtue of his position as the County Chairman of the Democratic Party, petitioner exercised de facto power to decide which firms would receive contracts with the Department of Transportation.

Nine lessors of heavy equipment testified that petitioner required them to pay percentage kickbacks in order to obtain contracts with the Department of Transportation (Pet. App. 31a). Most of the money was collected by co-defendant George at the time of the rental payments (Tr. 234-236, 260-263, 760-762). Other funds were collected by co-defendant Stevens (Tr. 314-316, 355-356). Initially, payments were made by check (Tr. 1106), but later they were made in cash at petitioner's request (Tr. 643). While the payments made by the lessors were sometimes characterized as political contributions, petitioner's secretary testified that the checks from the lessors were cashed at the direction of petitioner and the proceeds were paid to him (Tr. 946-954).

Petitioner offered no evidence in his defense. Co-defendant George testified that he had in fact collected money at the request of petitioner, that he turned the money over to petitioner or his secretary following collection, and that he believed that the money was going to the Democratic Party as a political contribution (Tr. 1115-1117).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court abused its discretion by preventing him from inquiring into co-defendant George's financial condition during George's cross-examination. This claim is without merit.

When petitioner sought to inquire into the general financial condition of his co-defendant during cross-examination, counsel for George objected on grounds of

relevance. The district court correctly sustained that objection (Tr. 1163-1167). Evidence that George kept some of the funds in question may have strengthened the government's case against George, but would not have rebutted the government's uncontradicted proof that petitioner himself received extortion funds. Indeed, petitioner did not contend at trial that such evidence would be exculpatory, acknowledging that the cross-examination was "being offered to impeach credibility, not to prove anything" (Tr. 1167). The trial judge was within his broad discretion in limiting the scope of this proposed cross-examination. See generally *United States* v. *Kenny*, 462 F. 2d 1205, 1225-1226 (3d Cir.), cert. denied, 409 U.S. 914 (1972). While the district court's ruling narrowed the scope of cross-examination to avoid unnecessary expenditure of time on tangential matters, it did not foreclose petitioner's right to cross-examine or to explore the credibility of the witness. See Fed. R. Evid. 611(a), 403.

2. Petitioner further contends (Pet. 13-15) that the trial court erred in refusing to allow him to call several witnesses who were prepared to testify that petitioner had not used extortion to obtain funds from them. This contention is also without merit.

During trial, petitioner's attorney advised the court that he knew of several persons who had contracted with the Department of Transportation during the time period in question and who would testify that they were not required to make extortionate payments (Tr. 1055). The district court, however, correctly concluded that such evidence would be legally irrelevant (Tr. 1179-1180). Evidence that the defendant has acted lawfully in dealing with persons different from those who are the victims of the illegal scheme charged in the indictment does not tend

to rebut the government's showing of guilt. Such evidence is properly rejected on grounds of relevance. See, *e.g.*, *United States* v. *Null*, 415 F. 2d 1178, 1181 (4th Cir. 1969); *United States* v. *Dobbs*, 506 F. 2d 445, 447 (5th Cir. 1975). Because the government proved that petitioner used extortion as charged in the indictment, his lawful behavior on other occasions provided no defense.

3. Petitioner also contends (Pet. 6) that the government failed to establish a sufficient nexus with interstate commerce.

The evidence at trial, however, showed that many of the victims of petitioner's extortionate scheme made substantial and continuing purchases of fuel and tires shipped in interstate commerce (Tr. 491-499, 513-519, 530-538, 546-560, 559-565, 570-576, 590-594, 596-601, 601-604, 612-613, 620-623). The heavy equipment used by some of the victims was purchased through interstate commerce (Tr. 505-510, 519-523, 576-579, 530-632, 663-669, 677-679). The effect of petitioner's extortionate activities was to diminish the resources of his victims and to impair their ability to conduct their substantial leasing businesses. This impairment in itself was sufficient to bring the extortionate scheme within the purview of the Hobbs Act. See *United States* v. *Cerilli*, No. 78-2105 (3d Cir. June 29, 1979), slip op. 14-16; *United States* v. *Daley*, 564 F. 2d 645, 649-650 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Mazzei*, 521 F. 2d 639, 642-643 (3d Cir.), cert. denied, 423 U.S. 1014 (1975).[2]

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[2]Congress used the full scope of its commerce power when it prohibited extortion affecting interstate commerce under the Hobbs Act. See *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

4. Finally, petitioner contends that he was entitled to an evidentiary hearing on his claim that his prosecution was selective and discriminatory. However, as both of the lower courts concluded after extensive analysis of this contention, petitioner made no prima facie showing that his prosecution involved intentional or purposeful discrimination. See *Oyler* v. *Boles*, 368 U.S. 448, 454-456 (1962). See also *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 9-11. There is no need for further review of the concurrent findings of the lower courts on this factual question. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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